STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Mr. Martin J. Lipske
District Attorney
Iron County
300 Taconite Street, Suite 123
Hurley, WI 54534

Dear Mr. Lipske:

In your letter dated April 14, 2008, you state that since approximately 1989 certain persons who have held the elective office of sheriff have been permitted by Iron County to retain one half of all service fees collected by the sheriff's office, an amount that currently is approximately $7,000 per year. You believe that this practice was the result of good faith negotiations involving the Iron County Board, the person who held the office of corporation counsel, and the person who held the office of sheriff at the time these negotiations occurred and this practice began. There appears to be a factual dispute or at least a difference of opinion as to whether the retention of half of the sheriff's service fees has been a continuous practice since the time the initial negotiations that you describe occurred.

Since at least 1997, no county board ordinance or resolution has expressly authorized the sheriff to retain any service fees. Your letter further indicates, however that "[i]n the early 2000's . . ." the county's auditors "recommended that those payments attach as a part of the Sheriff's salary[.]" You have orally indicated that the auditors did so because they were advised by the person who held the office of county clerk that the sheriff was entitled to retain one half of all service fees collected. At some point, the person who held the office of county clerk apparently also provided such advice to the sheriff. In response to the auditors' recommendation, you indicate that the amount of the sheriff's salary apparently has been internally posted in such a way that it is apparent that the sheriff's salary included one half of the service fees collected. It also appears, however, that recent public advertisements stating the amount of compensation for the office of the sheriff have mentioned only straight salary without any reference to the retention or inclusion of service fees.

I understand that the Iron County Board recently received information or was advised that retention of service fees by the sheriff violates Wis. Stat. § 59.22(1)(a)2. There apparently is disagreement as to whether members of the board were unaware that retention of service fees violated the statute, as to whether members of the board were only unaware that fees were being retained by the sheriff, or as to whether members of the board were unaware of both items. In response to whatever information or advice was received by the board, the finance committee

and the full county board apparently have voted to expressly discontinue the practice of allowing the sheriff to retain any service fees. As a result of this action, two distinct groups of county supervisors have emerged. One group would like to provide additional remuneration to the sheriff to make up for his inability to retain service fees. The other group maintains that the current sheriff is required to return all of the service fees that he has retained during the time that he has been in office.

In response to the concerns that have been expressed by these two groups of county supervisors, you ask what actions, if any, the county board can take to financially compensate the sheriff during the remainder of his term.

You also ask whether the current sheriff is required to repay the service fees he has retained during the time period that he has been in office. You have orally indicated that one of your principal concerns is whether in your capacity as district attorney you are obligated to seek repayment of fees retained by the current sheriff during the time period that he has been in office.

Each question is discussed in turn.

I. Compensation of the Sheriff

Wisconsin Stat. § 59.22 provides in part:

> Compensation, fees, salaries and traveling expenses of officials and employees. (1) ELECTIVE OFFICIALS. (a)1. The board shall, before the earliest time for filing nomination papers for any elective office to be voted on in the county, other than supervisors and circuit judges, which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid to the officer exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3). Except as provided in subd. 2., the annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in the resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board. Court fees shall not be used for compensation for county officers.
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> 2. The board shall establish the annual compensation of the sheriff as straight salary. No portion of that salary may include or be based on retention of fees by the sheriff. No portion of that salary may be based on providing food to

> prisoners under s. 302.37(1). This subdivision does not prohibit the reimbursement of a sheriff for actual and necessary expenses.
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> . . . .
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> (3) REIMBURSEMENT FOR EXPENSE. The board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employee for any out-of-pocket expense incurred in the discharge of that person's duty in addition to that person's salary or compensation, including without limitation because of enumeration, traveling expenses, tuition costs incurred in attending courses of instruction clearly related to that person's employment, and the board may establish standard allowances for mileage, room and meals, the purposes for which allowances may be made, and determine the reasonableness and necessity for such reimbursements, and also establish in advance a fair rate of compensation to be paid to the sheriff for the board and care of prisoners in the county jail at county expense.

Wisconsin Stat. § 59.22(1)(a)1. requires that the county board by resolution or by ordinance "establish the total annual compensation for services to be paid to the officer exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)" prior to the earliest date for filing nomination papers for the ensuing term of office. Wisconsin Stat. § 59.22(1)(a)1. expressly provides that "[t]he compensation established shall not be increased nor diminished during the officer's term[.]" Statutory provisions such as Wis. Stat. § 59.22(1)(a)1. and 2. prohibiting increases or decreases in compensation during an elected official's term of office have two purposes: (1) to prevent the influence of partisan bias or personal feeling in fixing the salaries of elected officials; and (2) to ensure that candidates for office know precisely the salary they will receive for performing their statutorily-required duties at the time they decide to run for office. *See* 61 Op. Att'y Gen. 403, 404-05 (1972), and 61 Op. Att'y Gen. 165, 166-67 (1972).

1987 Wisconsin Act 181, sec. 1d, created what is now Wis. Stat. § 59.22(1)(a)2. to provide in part that "[n]o portion of that [sheriff's] salary may include or be based on retention of fees by the sheriff." That new statute became effective on January 1, 1989. 1987 Wisconsin Act 181, sec. 8. Wisconsin Stat. § 59.22(1)(a)1. and 2. use the terms "salary" and "straight salary" in contradistinction to "expenses," which are reimbursable under Wis. Stat. § 59.22(3). Wisconsin Stat. § 59.22(3) provides that "[t]he board may provide for reimbursement to any elective officer . . . for any out-of-pocket expense incurred in the discharge of that person's duty in addition to that person's salary or compensation[.]" Reimbursement for part or all of any elected official's expenses under Wis. Stat. § 59.22(3) is discretionary with the county board and is not subject to the statutory restriction upon increases or decreases in salary during the elected official's term of office. *See Geyso v. Cudahy*, 34 Wis. 2d 476, 149 N.W.2d 611 (1967). Wisconsin Stat. § 59.22(1)(a)2. also expressly provides that "[t]his subdivision does not prohibit the reimbursement of a sheriff for actual and necessary expenses." The county board therefore

may increase the reimbursement level established for the sheriff's expenses during the sheriff's term of office but may not increase or decrease the established amount of the sheriff's salary during the sheriff's term of office.

II. Repayment of Service Fees

Your second question is whether the current sheriff is required to repay the service fees he has retained during the time period that he has been in office. You also ask whether in your capacity as district attorney you are required to seek repayment of those service fees.

"It is a fundamental principle of law that an actor should not be convicted of a crime if he had no reason to believe that the act he committed was a crime or that it was wrongful. An intent requirement was the general rule at common law." *State v. Jadowski*, 2004 WI 68, ¶ 43, 272 Wis. 2d 418, 680 N.W.2d 810. That common law principle is partially codified in Wis. Stat. § 939.43(1), which provides: "An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime." You advise that the practice of allowing the sheriff to retain one half of all service fees collected was the result of good faith negotiations involving the Iron County Board, the person who held the office of corporation counsel, and the person who held the office of sheriff at the time this practice began. It is unclear whether this practice was statutorily prohibited at the time that the negotiations you describe occurred. It is possible that the practice of allowing the sheriff to retain service fees involves the perpetuation of an inadvertent error on the part of all the parties involved at or shortly after the negotiations you describe occurred. It is also possible that an inadvertent error or errors occurred at some point after those negotiations concluded. In cases involving criminal statutes under which intent must be proven, "[t]he question of intent is generally one to be determined by the trier of fact." *State v. Lossman*, 118 Wis. 2d 526, 543, 348 N.W.2d 159 (1984). A legal opinion cannot resolve issues involving questions of fact. *See* 77 Op. Att'y Gen. Preface (1988) (copy enclosed), No. 3.C. Furthermore, it is a matter of prosecutorial discretion as to whether investigative and other legal resources should be expended in order to determine the possible existence of criminal intent under all of the facts and circumstances involved.

It also would not be appropriate to issue a legal opinion as to whether the current sheriff is required to repay all or part of the service fees he has retained during the time period that he has been in office. Certain county supervisors have suggested that a taxpayers' suit for the recovery of the fees that have been retained by the current sheriff is imminent. *See Cobb v. Milwaukee County*, 60 Wis. 2d 99, 107, 109-11, 208 N.W.2d 848 (1973). It is conceivable that legal defenses might be asserted in the event that a taxpayers' suit were commenced. *See, e.g., Frederick v. Douglas County and others*, 96 Wis. 411, 71 N.W. 798 (1897). It would not be appropriate to issue an opinion that might conceivably influence or affect the outcome of potential litigation. *See* 77 Op. Att'y Gen. Preface, No. 3.D. It also appears that questions of

fact would have to be resolved if a civil suit were commenced. As previously indicated, a legal opinion cannot resolve such questions.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla:lkw

Enclosure

Preface

The criteria to be observed when requesting a formal opinion of the attorney general have not been summarized since 62 Op. Att'y Gen. Preface (1973). Many requesters are not familiar with those criteria, and other criteria have been established since that time. I am therefore taking this opportunity to summarize and refine those criteria that have been established in prior opinions. They are as follows:

1. Except as otherwise provided by statute, formal opinions may only be issued to the Governor, the Legislature, state officers and agencies, county corporation counsel and district attorneys in connection with matters within the scope of their respective official duties. Opinions may not be issued to city, village, town or other municipal attorneys or to private citizens. A request should not be made by any authorized agency or official to circumvent these requirements.

Although these have been longstanding guidelines, *see* 62 Op. Att'y Gen. Preface (1973), not all of them have been expressly stated in prior opinions.

2. Any request from a corporation counsel, district attorney or a state officer or state agency that has staff legal counsel should satisfy all of the following criteria:

A. The request should set forth a tentative conclusion upon any question presented and the reasoning upon which that conclusion is based.

B. The request should set forth and analyze all relevant statutory provisions, case law and other authorities, whether or not they support the tentative conclusion concerning the question presented.

C. A question should not be submitted simply because someone wishes it submitted. A question should not be submitted unless, after having given the problem careful consideration, a satisfactory legal answer cannot be reached.

These guidelines were previously stated in 62 Op. Att'y Gen. Preface (1973) and in 31 Op. Att'y Gen. Foreword (1942).

3. All opinion requests from any source should comply with the following criteria:

A. The request should state each question upon which an opinion is desired. 62 Op. Att'y Gen. Preface (1973).

B. The request should state all of the facts giving rise to each question presented. 62 Op. Att'y Gen. Preface (1973).

C. Any request requiring the resolution of questions of fact should not be submitted, since the attorney general has no authority to decide questions of fact. 77 Op. Att'y Gen. 36 (1988); 68 Op. Att'y Gen. 416 (1979); 40 Op. Att'y Gen. 3 (1951).

D. An opinion should not be requested on an issue that is the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation. 62 Op. Att'y Gen. Preface (1973).

E. Opinions on matters involving the exercise of legislative or executive judgment or the exercise of discretion by public officers should not be requested. 77 Op. Att'y Gen. 36 (1988); 62 Op. Att'y Gen. Preface (1973); 40 Op. Att'y Gen. 3 (1951).

F. Normally, opinion requests from the Legislature should be approved by the Senate Organization Committee or the Assembly Organization Committee. They should be limited to the validity or application of state statutes or to matters which are or will be pending before the Legislature, and should not be used as a vehicle to obtain legal advice for individual constituents or constituent governmental agencies. *See* OAG 58-88 (unpublished) (October 12, 1988).

G. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. *See* 77 Op. Att'y Gen. 287 (1988).

H. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. *See* 77 Op. Att'y Gen. 120 (1988).

4. Although all of the foregoing criteria are subject to exception where the circumstances warrant, *see* 62 Op. Att'y Gen. Preface (1973), an opinion request which does not comply with these criteria may be returned to the requester with instructions to resubmit the request in an appropriate form.